APPENDIX "A"

In The

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 23901

CHARLES WILLIAM EATON and SAMMY LEE EATON,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Northern District of Mississippi

---

(July 12, 1968)

Before JONES and GODBOLD, *Circuit Judges,* and SCOTT, *District Judge.*

Per Curiam: The first count of the indictment against the appellants charged a conspiracy to possess distilled spirits in unstamped containers and to conceal and remove

"commodities" to evade taxes. The second and third counts charged the possession and transportation of untaxed spirits. In short, this is another moonshine liquor case. Charles William Eaton was found guilty by a jury verdict on the first two counts of the indictment and acquitted of the charge in the third count. Sammy Lee Eaton was convicted on all counts of the indictment. From the judgment and sentence of the court this appeal has been taken.

This Court is urged to reverse the convictions of the appellants on the ground that the Government prosecutor engaged in improper cross examination of a defense witness and one of the defendants, and on the ground that the prosecutor made improper remarks and argument to the jury. Although the appellants were represented at their trial by three experienced lawyers, none of the questions urged on this appeal by other counsel were raised at the trial by objection or otherwise. The appellants rely upon the plain error rule. Rule 52(b) Fed. Rules Crim. Proc. 18 U.S.C.A. As a prelude to the argument that this rule should be invoked, the appellants assert that they "were convicted by means of a trial which violated all known concepts of a fair trial in a federal court, thus" they say, they "were convicted unfairly without proper regard for due process of law."

Our examination of the record persuades us that it will never be used as a model for prosecutors to follow in other cases. Our examination does not persuade us that the appellants have been denied due process of law or that they have been deprived of any other constitutional right.

The plain error rule was intended to be and should be applied to serve rather than to subvert the ends of justice. The rule is to be invoked only in exceptional circumstances to avoid a miscarriage of justice. There was more than enough admissible evidence to establish the appellants' guilt. We cannot say that they were denied a fair trial. Tomley v. United States, 5th Cir. 1957, 250 F.2d 549, cert. den. 356 U.S. 928, 78 S.Ct. 716, 2 L.Ed. 2d 759; Mims v. United States, 5th Cir. 1967, 375 F.2d 135.

The judgment and sentences of the district court should be and are

AFFIRMED.

APPENDIX "B"

Sixth Amendment to the Constitution.

In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.

Rule 52(b), F. R. Cr. P., Title 18, U.S. Code.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Statutes Involved

TITLE 18, U. S. CODE, SECTION 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

TITLE 26, U. S. CODE, SECTION 5604 (a)(1)

Any person who shall . . . (1) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205(a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section; . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

TITLE 26, U. S. CODE, SECTION 7206(4)

Any person who . . . removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852.